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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CARL R. BERN, et al.,

11 Plaintiffs,

12 v.

13 WELLS FARGO BANK, N.A.,

14 Defendant.

CASE NO. C10-1701JLR

ORDER DENYING MOTION  
FOR PRELIMINARY INJUNCTION

15 **I. INTRODUCTION**

16 This matter comes before the court on Plaintiffs Carl R. Bern and Debra E. Bern's  
17 pro se motion for preliminary injunction (Dkt. # 3). Plaintiffs seek to enjoin the  
18 Defendant Wells Fargo Bank, N.A. ("Wells Fargo") from foreclosing on their home.  
19 Wells Fargo filed a notice of appearance (Dkt. #6), and appeared through counsel at the  
20 October 28, 2010 hearing. Having considered the submissions of the parties, and having  
21 heard oral argument, the court DENIES Plaintiffs' motion (Dkt. # 3).  
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## II. BACKGROUND

On October 21, 2010, Plaintiffs filed a complaint (Dkt. # 1) alleging various claims against Wells Fargo related to “a consumer contract for the refinance of a primary residence.” (Compl. at 1.) In addition, Plaintiffs filed a motion for temporary restraining order (Dkt. # 2) to enjoin the sale of their residence which was scheduled to occur the next day at 10:00 a.m., along with the present motion for preliminary injunction (Dkt. # 3).

The court granted Plaintiffs’ motion for a temporary restraining order, but in doing so ordered Plaintiffs to “file evidence of their compliance with the notice provisions of Washington’s Deed of Trust Act [“DTA”], RCW 61.24.130(2), and any other evidence relevant to their request for a temporary restraining order or preliminary injunction, prior to the . . . [preliminary injunction] hearing.” (Order (Dkt. # 4) at 2.) Plaintiffs have provided no further evidence or documentation concerning their compliance with Washington’s DTA, or with regard to their claim for preliminary injunction.

In their complaint, Plaintiffs allege that they “entered into a consumer contract for refinance of a primary residence.” (Compl. at 1.) They also allege that “Defendants [sic] acting in concert and collusion with others, induced Petitioner to enter into a predatory loan agreement with Defendant.” (*Id.*) Plaintiffs refer to “a 237,510.00 [sic] note at 7.0630% interest over 30 years,” but it is unclear if Plaintiffs are alleging these facts concerning their own loan with Wells Fargo, or merely offering these numbers as an exemplar to demonstrate the “handsome profit” that a lender might expect from such a loan. (Compl. at 4.) Beyond these allegations, Plaintiffs’ pro se complaint is largely

1 devoid of any specifics about the transaction at hand, and filled with generalized  
2 indictments of the entire mortgage and banking industries. (*Id.* at 2.)

3       Plaintiffs have not alleged or provided any documentation or other evidence  
4 concerning when the deed of trust at issue here was executed or recorded, any specific  
5 facts surrounding the negotiation or execution of their refinance loan with Wells Fargo,  
6 the amount of their loan that is in arrears, why their loan is in arrears, or whether they  
7 were given proper notice of default or of the trustee's sale. There is no allegation that  
8 Plaintiffs are not in default, nor is there an intelligible allegation of any irregularity in the  
9 present foreclosure process.

10       In addition to a lack of specific factual allegations, it is nigh impossible to discern  
11 what the Plaintiffs' legal claims may be. Plainly, Plaintiffs are upset by the generalized  
12 state of the banking and mortgage industries in this country and believe that deregulation  
13 and shoddy practices have "release[ed] the unscrupulous on the unwary" and caused  
14 harm to "the unsophisticated American public." (Compl. at 3.) Indeed, Plaintiffs  
15 "maintain[] the real culprit is the system itself, including the courts, for failure to strictly  
16 enforce the consumer protection laws." (Compl. at 2.) In the course of their  
17 denunciation of the "system," Plaintiffs do mention several types of claims and consumer  
18 protection statutes. Based on these references, the court gleans that Plaintiffs claims may  
19 include violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §  
20 2601 *et seq.*, violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*,  
21 deceptive advertising, unjust enrichment, breach of fiduciary duty, fraud, breach of  
22 implied covenant of good faith and fair dealing, infliction of emotional distress, and

1 negligence. (*See* Compl.) Although references to these possible causes of action are  
2 sprinkled throughout the Plaintiffs' complaint, Plaintiffs nevertheless fail to properly  
3 plead any claim. What is missing from the Plaintiffs' complaint is a connection between  
4 the causes of action they reference and the scant facts that they plead concerning their  
5 own particular circumstances.

6 The closest Plaintiffs come to alleging specific facts related to their loan  
7 transaction, the handling of their deed of trust, or the foreclosure on their home, is a list  
8 of specific fees that Plaintiffs claim were charged at the settlement of their loan. (Compl.  
9 at 13-14; Mot. at 11-12.) Plaintiffs allege that these charges were in violation of  
10 RESPA. (Mot. at 11.) However, Plaintiffs then go on to allege that they were in fact  
11 "unable to determine whether or not the above fees are valid in accordance with the  
12 restrictions provided by the various consumer protection laws." (*Id.* at 12.) Plaintiffs  
13 also invert the burden of proof by asserting that "[t]he . . . charges are . . . disputed and  
14 deemed unreasonable until such time as the said charges have been demonstrated to be  
15 reasonable." (*Id.*) Obviously, such allegations are improper. Thus, even where Plaintiffs  
16 have provided more detail, their allegations are still inadequate.

### 17 **III. STANDARDS**

18 "A plaintiff seeking a preliminary injunction must establish that he is likely to  
19 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
20 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
21 the public interest." *Winter v. Natural Res. Def. Council*, \_\_\_ U.S. \_\_\_, 129 S. Ct 365,  
22 374 (2008). In addition, the Ninth Circuit Court of Appeals has recently clarified that

1 “serious questions going to the merits and a hardship balance that tips sharply towards  
 2 the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a  
 3 likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance*  
 4 *for the Wild Rockies v. Cottrell*, \_\_\_ F.3d \_\_\_, 2010 WL 3665149, at \*8 (9th Cir. 2010).

#### 5 **IV. DISCUSSION**

6 Nonjudicial foreclosures in Washington are governed by the Deed of Trust Act  
 7 (“DTA”), RCW ch. 61.24. *Cox v. Helenius*, 693 P.2d 683, 685 (Wash. 1985); *see also*  
 8 *Vawter v. Quality Loan Serv. Corp. of Wash.*, 717 F. Supp. 2d 1115, 1121 (W.D. Wash.  
 9 2010) (explaining operation of the DTA). The procedure set forth in RCW 61.24.130 for  
 10 restraining a trustee’s sale initiated pursuant to the DTA is “the only means by which a  
 11 grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale  
 12 and foreclosure.” *Cox*, 693 P.2d at 686. Specifically, under RCW 61.24.130(1), a court  
 13 must “require as a condition the granting of a restraining order or injunction that the  
 14 applicant pay to the clerk of the court the sums that would be due on the obligation  
 15 secured by the deed of trust if the deed of trust was not being foreclosed.” *Id.* In  
 16 addition, RCW 61.24.130(2) provides:

17 No court may grant a restraining order or injunction to  
 18 restrain a trustee’s sale unless the person seeking the restraint  
 19 gives five days notice to the trustee of the time when, place  
 20 where, and the judge before whom the application for the  
 21 restraining order or injunction is to be made. This notice  
 22 shall include copies of all pleadings and related documents to  
 be given to the judge. No judge may act upon such  
 application unless it is accompanied by proof, evidenced by  
 return of a sheriff, the sheriff’s deputy, or by any person  
 eighteen years of age or over who is competent to be a  
 witness, that the notice has been served upon the trustee.

1 *Id.*

2 During the October 28, 2010 hearing, Plaintiffs acknowledged that they are unable  
3 to pay the amounts required under RCW 61.24.130(1) into the court's registry. Further,  
4 the court ordered Plaintiffs to provide evidence of their compliance with the notice  
5 provisions of the DTA prior to the court's hearing on Plaintiffs' motion for preliminary  
6 injunction (*see* Order at 2), but Plaintiffs have failed to provide any such evidence. Proof  
7 of service of the complaint and Plaintiffs' various motions on Wells Fargo will not  
8 suffice. Under the statute, the notice must be given to the trustee, not the beneficiary or  
9 bank. *See* RCW 61.24.130(2). Plaintiffs' acknowledgement of their inability to make  
10 payments into the court's registry, as well as their failure to timely provide notice under  
11 RCW 61.24.130(2) are sufficient grounds, in and of themselves, upon which to deny  
12 Plaintiffs' motion for preliminary injunction.

13 Plaintiffs also fail to establish a likelihood of success on or serious questions as to  
14 the merits of their claims due to their inadequate pleading. Plaintiffs have submitted no  
15 declarations or other evidence in support of their pleadings. When asked by the court at  
16 the October 28, 2010 hearing if they had anything further to submit, they stated that they  
17 had been "advised" to stand solely on the pleadings that they had already filed with the  
18 court. Those pleadings consist of their complaint (Dkt. # 1), their motion for temporary  
19 restraining order (Dkt. # 2), and their present motion for preliminary injunction (Dkt. #  
20 3). Because there is nothing else except their bare pleadings to consider when weighing  
21 their likelihood of success on the merits, the court first must determine if Plaintiffs have  
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1 even properly stated a claim. If not, then they certainly are not likely to succeed on the  
2 merits.

3 The adequacy of pleadings is governed by Federal Civil Procedure Rule 8(a)(2),  
4 which requires that a complaint contain “a short and plain statement of the claim showing  
5 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This rule “requires more  
6 than labels and conclusions, and a formulaic recitation of the elements of a cause of  
7 action will not do. Factual allegations must be enough to raise a right to relief above the  
8 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal  
9 citations omitted). Although the complaint is construed in the plaintiff’s favor, *Keniston*  
10 *v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983), the plaintiff must allege “enough facts to  
11 state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

12 Determining whether the allegations in a complaint are “plausible” is a “context-specific  
13 task that requires the reviewing court to draw on its judicial experience and common  
14 sense.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1950 (2009). If the “well-  
15 pleaded facts do not permit the court to infer more than the mere possibility of  
16 misconduct,” the complaint should be dismissed for failing to “show[] that the pleader is  
17 entitled to relief” as required by Rule 8(a)(2). *Iqbal*, 129 S. Ct. at 1950. For certain  
18 claims such as fraud or misrepresentation, a more stringent standard is mandated. Rule  
19 9(b) requires “a party to state with particularity the circumstances constituting fraud.”  
20 Fed. R. Civ. P. 9(b).

21 Plaintiffs’ complaint, although rife with generalized complaints concerning banks  
22 and mortgage companies, is nearly devoid of specific factual allegations relating to their

1 loan or the foreclosure on their home. They have certainly failed to plead either fraud or  
2 misrepresentation with the level of specificity required under the heightened standard of  
3 Rule 9(b), and they have failed to meet the standard set forth under Rule 8(a) for any of  
4 their remaining claims as well. Just because there may be inappropriate practices within  
5 an industry at large, does not mean that those practices have occurred in a particular  
6 matter. What is missing from Plaintiffs' complaint and motion for preliminary injunction  
7 is any connection between the causes of action they attempt to plead, their generalized  
8 complaints about the banking and real estate industries, and the particular facts of their  
9 case. Plaintiffs simply fail to demonstrate or allege how the generalized complaints  
10 contained in their pleadings relate to *their* loan or the foreclosure proceeding on *their*  
11 home. As such, they have again failed to demonstrate a likelihood of success on the  
12 merits.

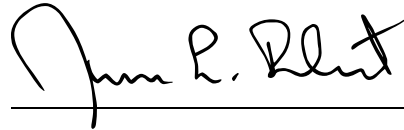
13 Because Plaintiffs have failed to follow the strict statutory procedures set forth in  
14 RCW 61.24.130 for the granting of injunctive relief with regard to the nonjudicial  
15 foreclosure of their property, and because they have failed to demonstrate a likelihood of  
16 success on or serious questions going to the merits of their claims, the court DENIES  
17 their motion for preliminary injunctive relief (Dkt. # 3), and lifts its prior temporary  
18 restraining order (Dkt. #2).

19 Counsel for Wells Fargo represented during the October 28, 2010 hearing that  
20 Plaintiffs had begun, but never completed, an application for a loan modification. In light  
21 of this fact, Wells Fargo has stipulated that it will postpone the trustee's sale of Plaintiffs'  
22 home until December 6, 2010, permitting Plaintiffs more time to complete their



1 application for and negotiate a possible modification of their loan terms with Wells  
2 Fargo. In the meantime, the court ORDERS the parties to file a status report regarding  
3 the status of the trustee's sale and the litigation no later than noon on December 2, 2010.

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5 Dated this 28th day of October, 2010.

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9 JAMES L. ROBART  
10 United States District Judge  
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